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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 757.

HELEN CORINNE SCALES TRICE, Executrix,
Petitioner,
vs.
COMMERCIAL UNION ASSURANCE
COMPANY, LTD., et al.,
Respondents.

ADDITIONAL BRIEF ON BEHALF OF PETITIONER.

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When Associate Justice Potter Stewart was on the Court of Appeals for the Sixth Circuit, he was on a division of circuit court judges who decided the case of **The Sucher Packing Co. v. Manufacturers Casualty Insurance Company (C. A. 6th), 245 F. 2d 513.** The court in its opinion in that case, written by Judge Shackleford Miller, declared:

> "Upon examination of the record, it is clear that the verdict of the jury was justified by the evidence. The jury obviously refused to give any credence whatever to the testimony of William Harris, except where

it was not in dispute; and, as the trial court charged, the jury is the sole judge of the credibility of witnesses."

We believe that the foregoing was generally, if not universally, considered to be the correct rule of law in the Federal courts, until this case was decided. In **Moore's Federal Practice, Vol. 6, Sec. 59.08 (5), page 3818**, it is stated:

> "There are statements in the cases that, in ruling on the motion, the trial judge acts as a thirteenth juror. Properly understood and applied, no fault can be found with them for the judge does evaluate and weigh the evidence. But while he has a responsibility for the result no less than the jury, he should not set the verdict aside as against the weight of the evidence merely because, if he had acted as the trier of the fact, he would have reached a different result; and in that same sense he does not act as a thirteenth juror in approving or disapproving the verdict. And since the credibility of witnesses is peculiarly for the jury it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict."

In the case at bar, the defendants had the burden of proving their defenses of false swearing in the proof of loss and intentional burning of the mill by the insured Joe W. Scales by a preponderance of the evidence. The trial judge correctly instructed the jury that they were the exclusive judges of the credibility of the witnesses. But, seven months after judgment had been entered on the verdict, the trial judge held that the jury were not the exclusive judges of the credibility of the witnesses, and that since they decided the credibility of the witnesses differently from the way he would have decided it, he set the verdict of the jury aside in order to put the case before another jury and give the defendants another chance.

This brings us to the decision of the Court of Appeals. A division of the court, with two district judges from the same state in which the trial judge sat, apparently forgetful that the burden of proof on the two issues of fraud and intentional burning was on the defendants to prove their defenses by a **preponderance** of the evidence, said it was enough to preclude them from disturbing the decision of the trial judge that they had examined the record and found substantial evidence that the insured was guilty of fraud and intentional burning of the mill. How may this be reconciled with the trial court's charge to the jury that, in order for them to find for the defendant on the two issues, they must find that to find the defendant had carried the burden of proving them by a **preponderance** of the evidence? Petitioner submits it cannot.

The jury were not instructed that they might find for the defendant if there was **some substantial** evidence that the insured was guilty of fraud and intentional burning. But, it was enough for the Court of Appeals to affirm the judge's action in setting aside the verdict that there was **some substantial** evidence on the two issues.

Manifestly, the Court of Appeals became confused. It confused the process of the appellate court in ruling on an appeal from a denial of a new trial motion asserting the verdict is against the weight of the evidence with an appeal from a grant of a new trial on that ground. If the trial judge denies the new trial motion, the appellate court limits its function to determining from an examination of the record whether the verdict was supported by substantial evidence. Such a case was **Grand Trunk Western Ry. Co. v. Westlie (C. A. 6th), 48 F. 2d 759.** Three of the greatest judges who ever sat on the Sixth Circuit Court of Appeals, Denison, Moorman and Hickenlooper, there said:

> "The contention that the verdicts are against the weight of the evidence cannot be considered, as this

court can go no further than determine whether there is **substantial evidence to support** them" (Emphasis added).

Cf. **Brown v. Poland (C. A. 10th), 325 F. 2d 985, 986.**

But an entirely different question is presented where the jury has returned a verdict against the side having the burden of proof on an issue and the judge sets the verdict aside as being against the weight of the evidence. In order to uphold the judge's exercise of discretion by an examination of the record, the appellate court must find as he did that the evidence overwhelmingly preponderates against the verdict. As the trial judge could not set the verdict aside merely because there was substantial evidence offered by the party having the burden of proof, neither can the court of appeals sustain his action by a mere finding from an examination of the evidence that the party obtaining the new trial offered some substantial evidence on issues as to which it would be entitled to a jury verdict only upon a preponderance of the evidence. This follows inevitably from the rule that it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict.

The confusion and harm that will result from the decision of the Sixth Circuit Court of Appeals in the law books in **334 F. 2d 673** is incalculable. If it is allowed to stand, it will mean that there has been a break-down in our jury system. It will have to be corrected some day. In order to do justice to petitioner it should be corrected on her present application.

Respectfully submitted,

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CORRECTIONS IN FORMER BRIEFS.

Petitioner's attorney regrets the necessity of asking that the following corrections be made in briefs heretofore filed:

Supplemental and Reply Brief

page 28—second line from bottom of page "COUNSEL ARE" instead of "COUNSEL IS"

page 40—next to last line in quotation should read: "that he had participated in procuring of the"—omit word "not"

Typewritten motion

page 3—fourth line from bottom of page insert "not" so that line reads "the Court of Appeals gave no good or sufficient reason for not passing on"